INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute involved	2
Statement	4
Reasons for granting the writ	9
Conclusion	20

CITATIONS

Cases:

Atherton v. *U. S.*, 128 F. 2d 463	11
Hollywood State Bank v. *Wilde*, 160 P. 2d 846	13
Moore v. *Stella*, 52 Cal. App. 2d 766	12
Natural Resources Corporation, 8 S. E. C. 635	11
Penfield Co. of Cal. v. *S. E. C.*, 143 F. 2d 746, certiorari denied, 323 U. S. 768	11, 12
People v. *Sidwell*, 151 P. 2d 145	12
Roland Electrical Company v. *Walling*, No. 45, this Term	18
S. E. C. v. *Associated Gas and Electric Company*, 99 F. 2d 795	18
S. E. C. v. *Bailey*, 41 F. Supp. 647	12, 13, 14
S. E. C. v. *Bourbon Sales Corporation*, 47 F. Supp. 70	11, 12, 13, 14
S. E. C. v. *Crude Oil Corp. of America*, 93 F. 2d 844	9
S. E. C. v. *Cultivated Oyster Farms Corp.* unreported, 1 S. E. C. Jd. Dec. 672, C. C. H. Fed. Sec. Laws Serv. par. 90, 121	11
S. E. C. v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344	9, 10, 12
S. E. C. v. *Payne*, 35 F. Supp. 873	12, 13
S. E. C. v. *Pyne*, 33 F. Supp. 988	11
S. E. C. v. *Tung Corp.*, 32 F. Supp. 371	13
S. E. C. v. *Universal Service Association*, 106 F. 2d 232, certiorrri denied, 308 U. S. 622	12
Skidmore v. *Swift & Co*, 323 U. S. 134	18
State v. *Gopher Tire & Rubber Co.*, 146 Minn. 52, 177 N. W. 937	12
State v. *Robbins*, 185 Minn. 202, 240 N. W. 456	11
State v. *Whiteaker*, 118 Ore. 656	19

682571——46——1

Statutes:

Securities Act of 1933, as amended, 15 U. S. C. sec 77a, et seq.:
Sec. 2 ..... 2, 9, 20
Sec. 3 ..... 3, 16
Sec. 4 ..... 4, 16
Sec. 5 ..... 3, 4

Miscellaneous:

General Rules and Regulations under the Securities Act of 1933:
Regulation A, 1 Fed. Sec. Law Serv., par. 4220–4224 ..... 8, 17
Regulation B, 17 C. F. R. 230.300–230.356 17
H. Reps. No. 85, 73d Cong., 1st Sess. (1933), p. 11 9

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 843

SECURITIES AND EXCHANGE COMMISSION,
PETITIONER
v.
W. J. HOWEY COMPANY AND HOWEY-IN-THE-HILLS SERVICE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Securities and Exchange Commission, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered November 13, 1945, which affirmed the judgment entered on April 18, 1945, by the United States District Court for the Southern District of Florida, Orlando Division.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 123–127) is reported in 151 F. 2d 714. The opinion of the District Court (R. 103–107) is reported in 60 F. Supp. 404.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 13, 1945 (R. 128). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, which is made applicable by Section 22 (a) of the Securities Act of 1933 (15 U. S. C. § 77v (a)).

QUESTION PRESENTED

The sole question presented is whether under the undisputed facts respondents are offering an "investment contract", as the term is included in the definition of a "security" in Section 2 (1) of the Securities Act of 1933 (15 U. S. C. § 77b (1)), when the offering consists of units of a citrus grove development coupled with a contract for cultivating, marketing and remitting the net proceeds to the investor.

STATUTE INVOLVED

Section 2 (1) of the Securities Act of 1933, as amended (15 U. S. C. § 77b (1)), provides as follows:

> The term "security" means any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, collateral-trust certificate, preorganization certificate or subscription, transferable share, *investment contract*, voting-trust

certificate, certificate of deposit for a security, fractional undivided interest in oil, gas, or other mineral rights, or, in general, any interest or instrument commonly known as a "security", or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any of the foregoing. [Italics supplied.]

The other pertinent provisions of the Act are as follows:

Sec. 5 (a) (15 U. S. C. § 77e (a)). Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

Sec. 3 (b) (15 U. S. C. § 77c (b)). The Commission may from time to time by its rules and regulations, and subject to such terms and conditions as may be prescribed therein, add any class of securities to the securities exempted as provided in this section, if it finds that the enforcement of this

title with respect to such securities is not necessary in the public interest and for the protection of investors by reason of the small amount involved or the limited character of the public offering; but no issue of securities shall be exempted under this subsection where the aggregate amount at which such issue is offered to the public exceeds $100,000.

Sec. 4 (15 U. S. C. § 77d). The provisions of section 5 shall not apply to any of the following transactions:

(1) . . . transactions by an issuer not involving any public offering; . . .

STATEMENT

This action was instituted by the Commission to enjoin W. J. Howey Company and Howey-in-the-Hills Service, Inc., from using the mails or instruments of transportation and communication in interstate commerce in the offer and sale of unregistered securities in violation of the registration requirements of Section 5 (a) of the Securities Act of 1933 (15 U. S. C. § 77e (a)) (R. 1–3). The facts are not in dispute and may be summarized as follows:

Respondents, W. J. Howey Company (hereinafter called the "Howey Company") and Howey-in-the-Hills Service, Inc., (hereinafter called the "Service Company") are Florida corporations under direct common control. They share the same offices; utilize the same facilities and personnel;

and have the same officers and directors, and substantially the same stockholders (R. 5–6, 94–95). The Howey Company is the owner of large tracts of citrus acreage in Lake County, Florida. The Service Company is engaged in cultivating and developing citrus groves. (R. 7, 95.) The Howey Company also owns and operates a tourist hotel at Howey-in-the-Hills, viz., the Floridan Country Club, the original purpose of which was "to house prospects for the purchase of land."[1] (R. 8–9, 64, 96.) The hotel's advertising circulars draw attention to the fine citrus groves in its vicinity; and during the course of their stay, patrons who come from all sections of the United States and Canada are given direct sales talks on investing in citrus groves which the Howey Company is offering for sale (R. 8–9, 20–30, 96–97).

It is explained that purchasers need not care for the groves; that the Service Company will undertake their development, and will harvest and market the crop; that it is not feasible to invest in a grove unless such service arrangements are made; and that while other service companies are available in the locality, the superiority of

[1] Mr. Taylor, vice-president of respondents, testified (R. 64): "Mr. Howey's original idea of it was to use it to house prospects for the purchase of land. Since 1940 we have operated it only as a tourist hotel. We have done general tourist advertising and attracted the general public, which was a departure from the plan under which Mr. Howey operated."

Howey's Service Company renders desirable the full contractual arrangement which respondents offer (R. 9–10, 28, 97). It is represented that profits for the 1943–44 season averaged 20% and might be higher for the 1944–45 season, and that purchasers could expect 10% per year on bearing groves for the next ten years (R. 27, 96). Investors have been predominantly non-residents who possess neither the knowledge, skill, nor equipment necessary for the care and cultivation of citrus trees. They are professional and business people, and the like, residents of 23 states and Canada. (R. 97.)

The standard land sales contract, in effect since 1935, provides for a uniform purchase price per acre or fraction thereof, but varying in amount with the number of years the particular plot has been planted with citrus trees (R. 7, 11–15, 99). Land sales of the Howey Company during the three-year period ending May 31, 1943, amounted to $165,788.00 (R. 34). The average purchase during the period February 1, 1941 to May 31, 1943, was only 1.33 acres, and included sales of as little as .65, .7 and .73 of an acre (R. 31–34, 97). Purchases are in narrow strips which may comprise only a single row of trees (R. 46, 99). The various tracts are not separately fenced and, except for small land marks intelligible only through a plat book record, there is no appearance of multitudinous ownership (R. 46–47, 99).

While the Howey Company does not condition its sales of citrus acreage upon the acceptance of a service contract with the Service Company, a study of sales for the three-year period ending May 31, 1943, shows that 85% of the acreage sold during this period was covered by an accompanying agreement with the Service Company (R. 10, 71, 97).

The standard service contract also in effect since 1935, accords the Service Company full possession of the land for a nominal rental. The equipment maintained by the Service Company to care for this great development is substantial, and includes 75 tractors, sprayer wagons, fertilizer trucks, and other machinery. For a specified fee plus cost of labor and materials, the Service Company cultivates and maintains each grove, gathers and markets the crop, and remits the net proceeds to the investor (R. 7, 15–20, 45, 101). The investor has no right to market his own crop unless consented to by the Service Company, and provided no moneys are owed the latter (R. 18). In most cases, the agreement was for a period of ten years without option of cancellation (R. 31–34). Allocation of proceeds is based upon a check made at the time of picking of the produce from each individual tract. After picking, the produce from the various tracts is pooled.[2]

[2] Under the absolute discretion conferred by the contract produce may be sold on the tree to an independent picker, or

The mails and instruments of transportation and communication in interstate commerce were used in the sale of the land sales and service contracts; but, at no time, has a registration statement under the Securities Act of 1933 been in effect with this Commission with respect to these contracts (R. 11, 102). Nor does it appear that respondents have complied with the requirements of the Commission's regulation for exemption of limited offerings pursuant to Section 3 (b) of the Act.[3]

The District Court denied the injunction on the ground that the transactions involved did not constitute sales of a "security" within the meaning of Section 2 (1) of the Act (R. 102). In affirming, the Circuit Court of Appeals refused to apply the Commission's suggested definition of an "investment contract" as including any contractual arrangement for the investment of money with the expectation of profit through the efforts of the promoters. It emphasized the fact that the activity or pursuit here had passed out of what it regarded as the "promotional" or experimental stage, and that the land sold had "specific value"

---

harvested and marketed directly by the Service Company. Respondents have their own packing plant and cannery for such purposes. (R. 45.)

[3] Regulation A of the General Rules and Regulations under the Securities Act of 1933, adopted pursuant to Section 3 (b) of the Act, 1 Fed. Sec. Law Serv., pars. 4220 to 4224. See *infra*, pp. 16–18.

independent of the success of the enterprise as a whole, and concluded that these circumstances, assumed not to have been present in *S. E. C.* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344, and other authorities relied on by the Commission, resulted in insufficient "*nexus* between the sale and the enterprise" to make the purchase "not of a specific thing but of an interest in the enterprise." (R. 126–127.)

REASONS FOR GRANTING THE WRIT

1. In refusing application of the long established judicial definition of the term "investment contract," as used in Section 2 (1) of the Act and in preceding state "blue sky" laws, the ruling of the court below conflicts with other federal and state decisions, including those of other circuit courts of appeals.

The broad definition of "security" as including an "investment contract" is not an innovation introduced by the federal statute. In Section 2 (1) of the Securities Act of 1933, Congress merely followed the pattern of many state "blue sky" laws, which give the term wide scope to include the variegated schemes conceived by those who would circumvent the law.[4] Relying in part on the decisions under state law, the courts have construed the phrase "investment contract" in

[4] See H. Rep. No. 85, 73d Cong., 1st Sess. (1933), p. 11; *S. E. C.* v. *Crude Oil Corp. of America*, 93 F. 2d 844, 847 (C. C. A. 7, 1937).

Section 2 (1) to include any transaction where the investor looks solely to the efforts of the promoter for the success of his investment. Instances are referred to in this Court's opinion in *Securities and Exchange Commission* v. *C. M. Joiner Leasing Corporation,* 320 U. S. 344, 352 n. 10:

> One's cemetery lot is not ordinarily thought of as an investment and is most certainly real estate. But when such interests become the subjects of speculation in connection with the cemetery enterprise, courts have held conveyances of these lots to be securities. *Matter of Waldstein,* 160 Misc. 763, 291 N. Y. S. 697; *Holloway* v. *Thompson,* 42 N. E. 2d 421 (Ind. App.). For other instances where purported sales of property have been held 'investment contracts' see *S. E. C.* v. *Crude Oil Corp.,* 93 F. 2d 844 (interest in oil royalties sold as bill of sale for specified number of barrels of oil); *S. E. C.* v. *Tung Corporation,* 32 F. Supp. 371; *S. E. C.* v. *Bailey,* 41 F. Supp. 647 (land bearing tung trees, to be developed by seller); *S. E. C.* v. *Payne,* 35 F. Supp. 873 (silver foxes); *Prohaska* v. *Hemmer-Miller Development Co.,* 256 Ill. App. 331 (farm land, to be paid for with proceeds of crops raised by vendor); *Kerst* v. *Nelson,* 171 Minn. 191, 213 N. W. 904 (land to be cultivated as a vineyard by a third party); *Stevens* v. *Liberty Packing Corp.,* 111 N. J. Eq. 61, 161 A. 193 (rabbits).

Other instances include securities disguised as sales of muskrats,[5] oyster bottom acreage,[6] shares in fishing boats,[7] and whiskey bottling and sales contracts.[8] The Commission's administrative interpretation of the term has been equally broad. It is set forth in one published opinion, *Natural Resources Corporation,* 8 S. E. C. 635, 637,[9] but has developed principally in informal conferences and in the position which the Commission has taken in litigation.

Both the Seventh and Ninth Circuits have accepted the Commission's construction of investment contract as including agreements where "the purchasers [look] entirely to the efforts of the promoters to make their investment a profitable one." *Atherton* v. *U. S.,* 128 F. 2d 463, 465

---

[5] *State* v. *Robbins*, 185 Minn. 202, 240 N. W. 456 (1932).

[6] *S. E. C.* v. *Cultivated Oyster Farms Corp.*, unreported, 1 S. E. C. Jud. Dec. 672, C. C. H. Fed. Sec. Laws Serv. par. 90, 121 (S. D. Fla. 1939).

[7] *S. E. C.* v. *Pyne*, 33 F. Supp. 988 (D. Mass. 1940).

[8] *S. E. C.* v. *Bourbon Sales Corp.*, 47 F. Supp. 70 (W. D. Ky., 1942), and *Penfield Co. of Cal.* v. *S. E. C.*, 143 F. 2d 746 (C. C. A. 9, 1944), certiorari denied, 323 U. S. 768.

[9] In this opinion the Commission thus expressed its understanding of the common thread underlying the various cases which have turned on the definition of an "investment contract":

"Thus, transactions which, in form, appear to involve nothing more than the sale of real estate, chattels, or services, have been held to be investment contracts where, in substance, they involve the laying out of money by the investor on the assumption and expectation that the investment will return a profit without any active effort on his part, but rather as the result of the efforts of someone else."

(C. C. A. 9, 1942); *Penfield Company of Cal.* v. *S. E. C.*, 143 F. 2d 746, 750–751 (C. C. A. 9, 1944), certiorari denied, 323 U. S. 768; *S. E. C.* v. *Universal Service Association,* 106 F. 2d 232, 237 (C. C. A. 7, 1939), certiorari denied, 308 U. S. 622.[10] Moreover, the decision below is scarcely distinguishable on its facts from several of the unappealed district court cases cited with approval by this Court in the *Joiner* case. *S. E. C.* v. *Bailey,* 41 F. Supp. 647 (S. D. Fla.) (tung trees); *S. E. C.* v. *Payne,* 35 F. Supp. 873 (S. D. N. Y.) (silver foxes). See also *S. E. C.* v. *Bourbon Sales Corporation,* 47 F. Supp. 70 (W. D. Ky.) (barrels of whiskey).

2. The ruling of the court below, while purporting to distinguish earlier authorities, including the *Joiner* case, rejected the formulation of the test of what constitutes an "investment contract" in the lower court decisions, and introduced a novel test which the Commission regards as administratively impractical and not warranted by the statute.

This new test appears to involve the following propositions: first, that a case such as the *Joiner*

---

[10] The lower federal court and state court decisions in which this definition has been the guiding standard are numerous. See e. g., *S. E. C.* v. *Bailey*, 41 F. Supp. 647, 650 (S. D. Fla., 1941); *S. E. C.* v. *Bourbon Sales Corp.*, 47 F. Supp. 70, 72–73 (W. D. Ky., 1942); *S. E. C.* v. *Payne*, 35 F. Supp. 873, 878 (S. D. N. Y. 1940); *State* v. *Gopher Tire & Rubber Co.*, 146 Minn. 52, 56, 177 N. W. 937, 938 (1920); *People* v. *Sidwell*, 151 P. 2d 145, 148–149 (Cal. App. 1944); *Moore* v. *Stella*, 52 Cal. App. 2d 766, 778, 127 P. 2d 300, 306 (1942).

case which takes the form of a sale of an interest in real estate is a close one, not necessarily to be followed under slightly variant circumstances; and, second, that the trial court need not regard the contemporaneous offering of a contract to produce income from the interest in tangible property as making the combined transaction a sale of an investment contract if the tangible interest has "specific value", independent of the success of the enterprise as a whole, and is susceptible of severable management, and if the activity is not in the promotional or experimental stage. It should be noted, however, that in many of the cases cited, the tangible interest sold, e. g., barrels of whiskey,[11] silver foxes,[12] chinchillas,[13] planted acreage,[14] did have specific value independent of the expectation of profits to flow from the promoters' management. Many of the cases also involved an attempted segregation of profits attributable to the individual units sold to particular investors, and thus could as readily as the present promotion be conceived of as a series of separate enterprises under common management rather than one single enterprise. See, e. g., *S. E. C.* v. *Bailey*, 41 F. Supp. 647 (S. D. Fla.); *S. E. C. v. Payne*, 35 F.

[11] *S. E. C.* v. *Bourbon Sales Corp.*, 47 F. Supp. 70 (W. D. Ky., 1942).

[12] *S. E. C.* v. *Payne*, 35 F. Supp. 873 (S. D. N. Y. 1940).

[13] *Hollywood State Bank* v. *Wilde*, 160 P. 2d 846 (Cal. App. 1945).

[14] *S. E. C.* v. *Bailey*, 41 F. Supp. 647 (S. D. Fla. 1941); *S. E. C.* v. *Tung Corp.*, 32 F. Supp. 371 (N. D. Ill., 1940).

Supp. 873 (S. D. N. Y.); *S. E. C.* v. *Bourbon Sales Corp.*, 47 F. Supp. 70 (W. D. Ky.). While some of the cases do stress elements in the particular situations making the enterprise a common one, there is no suggestion in the statutory language that an investment contract is limited to an investment in a common enterprise. The requirement of a public offering does, of course, require sufficient community of interest to make the individual units offered substantially similar investments.[15]

The court below apparently assumed, as the same district court had expressly held in an earlier case,[16] that a substantially identical form of transaction would involve a "security" where the acreage was planted to tung trees rather than citrus trees, because the tung growing enterprise was assumed to be more experimental and speculative. Since the production of tung oil for paint is an activity of great antiquity, at least among the

[15] In the court below respondents laid great stress on the fact that some of the investors did in fact arrange for separate management, so that in those instances the transactions could not, even on the Commission's theory, involve anything but the sale of land by respondents. The short answer to this argument is that all investors were offered the combination sales and service contract, and the statute makes unlawful the offer or sale of an unregistered, nonexempt, security. It should also be noted that the sales emphasis upon recent profits of 20% and expected average profits of 10% were related to the hypothesis of service by respondents.

[16] *S. E. C.* v. *Bailey*, 41 F. Supp. 647 (S. D. Fla., 1941).

Chinese, we are not clear whether the distinction turns upon the supposed established character of the industry or the established character of the particular promoter. In the Commission's experience there is infinite gradation in the degree of speculation involved in different promotional activities, making it utterly impractical to employ such a test as to whether or not a security is involved. How speculative the particular security may be is a matter for the judgment of the investor and not within the scope of the statutory regulation, which is designed merely to insure adequate disclosure so that the investor's judgment may be an informed one.[17]

It should be noted that the court's rejection of the previous uniformly recognized test of what constitutes an investment contract appears to stem from assumptions as to the practical effect of that test, which are unwarranted in view of the entire regulatory scheme. Thus the opinion concludes:

> To say that because a purchaser of a farm or a building, at the time and in connection with the purchase, secured the services of another, whether the seller, someone connected with him, or someone entirely independent of him,[18] to manage it, he be-

[17] To a certain extent, of course, the speculative character of the securities involved may affect the exercise of the Commission's discretion in granting exemptions under its rule-making power. See *infra*, pp. 16–18.

[18] The Commission did not, as the above quotation suggests, urge that there would be an offer or sale of a security

> came a purchaser not of property but of a security, an investment contract, is to stretch beyond the breaking point the analogy of the *Joiner* case. It is, indeed, to run a good principle into the ground. (R. 127.)

In assuming the necessity for thus limiting the concept of an "investment contract", the Court gave no consideration to the fact that the Act does not impose a rigid pattern of disclosure regulation upon every security transaction involving the use of the mails or the instrumentalities of interstate commerce. Thus, there is an unconditional exemption from registration in the case of transactions which do not involve a "public offering" of substantially identical units. See Section 4 (1), 15 U. S. C. § 77d (1). Unconditional exemptions are also available for transactions which Congress deemed by their nature to give adequate protection to investors. See, e. g., Section 3 (a) (9) and 3 (a) (10), 15 U. S. C. §§ 77c (a) (9) and 77c (a) (10). In addition, the Commission has adopted rules pursuant to its discretionary powers under Sec. 3 (b), 15 U. S. C. § 77c (b), exempting from the full registration provisions of the Act any public offering of securities under $300,000 each year, conditioned only upon filing a

---

if the management arrangement was with "someone entirely independent" of the vendor. In this case there was both a working arrangement and a community of ownership between the vendor and the service company.

simple letter of notification with the appropriate local office of the Commission. See Regulation A of the Rules and Regulations under the Securities Act of 1933, 1 Fed. Sec. Law Serv., pars. 4220 to 4224.

This so-called "limited offering" exemption is only from the registration requirements of the Act and does not exclude the civil and criminal sanctions applicable to fraudulent transactions. The Commission's regulations under this section, while not burdensome to the issuer, serve to put the Commission on notice of possibly fraudulent transactions.[19]

When the court below concluded that it would be unreasonable to apply the term "investment contract" to transactions which take the form of the sale of a specific thing where the activity in question may have passed out of the promotional or experimental stage, and the thing sold may have specific value independent of the anticipated efforts of the promoters, (R. 126–127), it introduced criteria which, however relevant to a generalized administration determination of the conditions for exemption from registration of limited offerings, could have no relevance to whether or not the transactions should be im-

[19] Special requirements are imposed with respect to exemption of oil securities which have been found necessary because of the element of return of capital and recurrent experience with fraud in that field. See Regulation B of the General Rules and Regulations under the Securities Act of 1933, 17 C.F.R. 230.300–230.356.

mune from the fraud sanctions of the Act or from the minimum requirements that a notification be filed in a regional office of the Commission. In thus attempting to force the definition of a "security" to perform the entire function of inclusion and exclusion, we believe that the Court not only gave an unduly restrictive scope to the term investment contract but also intruded in the area of exemption confided by Congress to the discretion of the Commission.[20]

3. The question presented is one of importance in the administration of the Securities Act of 1933 since it overrules consistent administrative interpretation of what types of transactions may fall within the reach of the Act. The decision points a way by which many promoters may escape even the fraud sanctions of the Act. As a minimum, immunity would be provided where they can limit their activity to enterprises which have passed the "promotional or experimental stage" (R. 126) and maintain a formal separation between the sale of tangible property and accompanying contractual arrangements upon

[20] It is especially where policy considerations are involved that this Court has emphasized the weight which will be given the administrative interpretation of statutory language. See *Skidmore* v. *Swift & Co.*, 323 U. S. 134; *Roland Electrical Company* v. *Walling*, No. 45, this Term. For a specific application of this approach in the field of defining Securities Act terms, see *Securities & Exchange Commission* v. *Associated Gas and Electric Company*, 99 F. 2d 795 (C. C. A. 2, 1938).

which the investor relies for his expectations of income. The vagueness of the criterion below is fraught with difficulties of administration and, if it does not repudiate, at least casts a cloud of doubt upon the decisions which the Court below purports to distinguish.

We make no suggestion that the program of the respondents was adopted for any improper purpose. The fact remains, however, that the sale of property with a contract for the development of such property has generally been used as a device by which fraudulent promoters have sought to escape the application of securities laws. The efficient enforcement of such acts in the field of stocks and bonds has driven fraudulent promoters into veiled and devious ways of achieving substantially the same result. If the present decision is permitted to stand, it will afford a simple chart for such promoters to which it may be expected that they will conform their fraudulent sales. The processes driving the fraudulent promoter from the securities field will thus be halted and a new safe haven created for such promoters. Such a construction should not be given to an Act of broadly remedial character designed to reach substance rather than form.[21]

---

[21] See, for example, the statement of the Court in *State* v. *Whitaker*, 118 Ore. 656, 661 (1926):

"It was the intention of the Legislature to use the term 'securities' in a broad sense, not a literal one * * *.

"We do not deem it advisable to lay down any hard and

CONCLUSION

Because of the conflict between the court below and federal courts in other circuits, including the Seventh and Ninth Circuit Courts of Appeals, as to the criteria of an "investment contract" as used in the definition of a "security" in Section 2 (1) of the Act, because of the unsound and unworkable character of the criteria of the court below and its purported distinctions of other lower court cases and this Court's holding in the *Joiner* case, and because of the importance of the question presented to the administration of the Act, the petition for a writ of certiorari should be granted.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

ROGER S. FOSTER,
Solicitor, Securities and Exchange Commission.

FEBRUARY, 1946.

---

fast rule to determine whether similar offerings to the public may be sold without a license. Were we to do so, a certain class of gentlemen of the 'J. Rufus Wallingford' type—'they toil not neither do they spin'—would lie awake nights endeavoring to conceive some devious and shadowy way of evading the law. * * *"

U. S. GOVERNMENT PRINTING OFFICE: 1946